IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.297 OF 2006

IN

NOTICE OF MOTION NO.1450 OF 2005

IN

S.C.SUIT NO.4829 OF 2001

WITH

CIVIL APPLICATION NO.1323 OF 2005

Martin Clamant Passanha
(since deceased)
1a) Mrs.Pracilla Wd/o.Martin
Passanha & Ors. ...Appellants

Versus

The Union of India & Ors. ...Respondents

.....

Mr.P.M.Havnur for Appellants.

Mrs.N.V.Masurkar for Respondents.

.....

CORAM: A.M.KHANWILKAR, J.

APRIL 28, 2006.

P.C.

1. Heard Counsel for the parties.

2. The reason indicated by the Trial Court for dismissing the Motion taken out by the Appellants is unexceptionable. If the Motion for restoration of the Suit is barred by limitation, it was necessary that it is accompanied with application for condonation of delay. It is only on condoning delay, the Court can assume jurisdiction to consider the request of restoration of Suit. The fact that there is no prayer for condoning delay in the Notice of Motion, is not in dispute.

3. Counsel for the Appellants submits that the mistake has occasioned due to inadvertence and obviously, it is mistake of the Advocate. For such mistake of the Advocate, litigant should not be made to suffer. He further submits that if one opportunity is granted to the Appellants, the Appellants will carry out necessary amendment in the Notice of Motion and file appropriate affidavit before the Trial Court making out sufficient cause for condoning the delay as well.

4. Counsel for the Respondents, however, submits that the defective Motion as was filed by the Appellants was with purpose. The Appellants are interested in gaining time and have taken recourse to all possible proceedings to succeed in that direction.

5. This objection to my mind, would be relevant before the Trial Court where the Motion will be heard on its own merits - firstly, in respect of the prayer for condonation of delay in filing the same. While opposing that prayer, it will be open to the Respondent to take such plea as may be permissible by law, which will have to be decided on its own merits by the Trial Court.

6. Accordingly, this Appeal succeeds on the following terms :

> The impugned Judgment and order is set-aside. Instead, the Notice of Motion No.1450 of 2005 is restored to the file of the Trial Court on condition that the Appellants shall carry out necessary

amendment and file further affidavit within three weeks from today, failing which, it will be assumed that the order passed on the said Motion by the Trial Court on 8th August 2005 which is impugned in this Appeal has been revived.

The Trial Court shall decide the Notice of Motion after giving fair opportunity to both sides to file further pleadings as may be advised and resolve all contentious issues arising for its consideration on its own merits in accordance with law.

The Appellants shall pay cost quantified at Rs.5,000/- (Rupees Five Thousand) to the Respondents. Cost be made over to the Counsel for the Respondents. Payment of cost is condition precedent for showing indulgence as referred to above.

Parties shall maintain status-quo as of today with regard to the suit property. If the position as obtained on 22nd

October 2001 when order was passed in Appeal from Order No.927 of 2001 has remained unchanged, the same position be maintained by the parties.

7. Appeal from Order and the Civil Application stand disposed of on the above terms.

A.M.KHANWILKAR, J.